NO. 88-461

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

JOSEPH M. GIARRATANO, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Did the Fourth Circuit, sitting *en banc*, err in holding (a) that the District Court's findings of fact, supporting its conclusion that Virginia's Death Row inmates are deprived of meaningful access to the courts to pursue state habeas corpus remedies, were not clearly erroneous, and (b) that the District Court's remedy of requiring that legal representation be provided prior to, rather than following, the filing of state habeas corpus petitions did not constitute an abuse of discretion?

2. Should the lower courts' decisions be affirmed on the alternative grounds of the Eighth Amendment, the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment, the Sixth Amendment, or Article I to the United States Constitution?

LIST OF PARTIES

The plaintiffs in the proceedings below included Joseph M. Giarratano, Johnny Watkins, Jr., Richard T. Boggs and a class certified by the District Court, comprised of

> all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court and who either (1) cannot afford to retain and do not have attorneys to represent them in connection with their post-conviction proceedings, or (2) could not afford to retain and did not have attorneys to represent them in connection with a particular post-conviction proceeding.

847 F.2d 1118, 1120 (4th Cir. 1988). The "future" category has come to include, in the 30 months following the trial, fifteen new Death Row inmates.

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NO. 88-411

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

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BRIEF FOR RESPONDENTS

The reliability of society's decision to impose its most severe sanction depends on the outcome of habeas corpus proceedings brought in state and federal courts by Death Row inmates. During the twelve years since executions have resumed in this country, the majority of Death Row inmates who have brought such proceedings have prevailed in overturning their sentences. All were represented by lawyers.

The Commonwealth of Virginia is one of a few remaining states that still do not provide lawyers for habeas proceedings in capital cases. Unlike other jurisdictions, Virginia is determined to treat capital cases the same as matters where a human life is not at stake. Accordingly, Petitioners have argued below that a death sentence is not "a real and immediate threat of injury" and even

that erroneous execution is not an "irreparable injury." (Opening Brief of Appellant Cross-Appellee (4th Cir.) at 40 n.5; Memorandum in Support of Defendants' Response to Plaintiffs' Motion for A Preliminary Injunction (E.D. Va.) at 16-17)

Virginia's exceptional views are compounded by a phenomenon unique to the Commonwealth: Virginia has no qualms over executing the unrepresented. The Commonwealth immediately sets execution dates for Death Row inmates who do not file habeas petitions within a few weeks of the conclusion of their direct appeals (including certiorari). If a condemned person fails to meet the Commonwealth's schedule, Virginia officials admit they will electrocute him "whether he [has] a lawyer or not." (J.A. 284)

The purpose of this case is not, contrary to the claims of Petitioners and the Fourth Circuit dissenters, to challenge whether Virginia may impose capital punishment. The Commonwealth has executed three men since this action was filed. The issue here is whether a state that does choose to invoke the ultimate sanction must bear the attendant obligations recognized as critical by Congress, the other states, and the courts.

Many, many times in the half century since the Scottsboro decision, this Court has recognized that the punishment of death is vastly unlike all others; special measures are called for to ensure that society does not mistakenly execute the innocent. This is such a time. The Constitution cannot permit a state to bar its Death Row inmates from access to conventional remedies by denying them legal assistance and hastily executing them -- not when more than half of those who, so assisted, demonstrate that their sentences were improper.

STATEMENT OF THE CASE

I. THE FACTUAL SETTING

A. The Crisis in Virginia

This case arose when Virginia attempted to execute a mentally retarded Death Row inmate who, because he could not afford a lawyer, was unable to institute state habeas corpus proceedings. (J.A. 162-63) Seven weeks after this Court denied

certiorari on the direct appeal of Earl Washington's conviction and death sentence, Mr. Washington asked a Virginia Circuit Court judge to appoint a lawyer to help him file a state habeas petition. The judge denied Mr. Washington's motion and, in the same order, scheduled his execution. (J.A. 101, 162-63; Px 22, J.A. 314) Mr. Washington's only opportunity for living long enough to begin his habeas proceedings therefore lay in his somehow finding (and persuading) an attorney to take his case without pay.

In Virginia, the sole method for a Death Row inmate to obtain counsel is by asking a fellow Death Row inmate, Respondent Joseph M. Giarratano, to contact Marie Deans of the Virginia Coalition on Jails and Prisons. (J.A. 198-99) Ms. Deans, a non-lawyer, formed this organization in 1983 after learning that "nobody in Virginia seemed to know who was [on Death Row] and who had attorneys and where they would get attorneys if they needed attorneys." (J.A. 154) Ms. Deans therefore began monitoring Virginia's Death Row, and attempting to find lawyers for the inmates who needed them. (J.A. 155)

The Commonwealth itself has relied exclusively on this layperson and her uncompensated recruiting efforts as Virginia's "system" of legal assistance for Death Row inmates. James Kulp, Virginia's Senior Assistant Attorney General and "Coordinator of all Capital Litigation in the Commonwealth," (J.A. 269) testified:

> Q. Now, what happens after a certiorari lawyer who has been doing this case for free tells you he is not able to handle it anymore? What do you do?
>
> A. In the past I have been calling Marie Deans. Or she has called me, one or the other.
>
> Q. What do you tell her?
>
> A. I said, are we going to have somebody represent this person? And she says, yes, we are looking. And at times she has difficulty, but she has had people and we have dealt with them . . . .

(J.A. 288-89; *see also* J.A. 229, 231, 242-43, 244, 283) As Petitioners acknowledge (Br. at 7), Ms. Deans has experienced increasing difficulty in locating volunteers to represent Virginia's in-

digent Death Row inmates. (J.A. 157-58; *see also* J.A. 68-69, 75, 76-77, 167, 199-200, 233-34)[1]

When Ms. Deans began looking for a lawyer for Mr. Washington (while simultaneously searching for lawyers for four other Death Row inmates (J.A. 162)), she found that the supply of volunteers was exhausted:

> I contacted over a hundred attorneys. I contacted the D.C. Pro Bono bar, the Legal Defense Fund, the Southern Prisoners Defense Committee, Attorneys in Georgia, if you believe that. Attorneys in South Carolina, Attorneys in North Carolina. All the way up through New York. I went to large firms, I went to anybody.

(J.A. 158-59; Px 1; J.A. 296) Nobody would take Mr. Washington's case. (J.A. 162)

A little more than a month after denying Mr. Washington a lawyer, the Commonwealth moved him 100 miles away from Death Row to a small cell in the basement of the State Penitentiary in Richmond -- down the hall from the electric chair. (J.A. 11-13, 162, 204) Ms. Deans again implored the Virginia Bar for help. (J.A. 306-10) Other people and organizations, including the NAACP Legal Defense and Educational Fund and the American Civil Liberties Union, also began scrambling to find someone to represent him. (J.A. 68, 306-10)

With Mr. Washington's execution barely two weeks off, Mr. Giarratano, in desperation, wrote United States District Judge Robert R. Merhige, asking his assistance because of the "gravity of the situation":

Dear Judge Merhige:

• • •

A fellow co-plaintiff in the above styled matter, Earl Washington, Jr., was transferred to the State Pen on August 16, for execution on September 5, 1985.

---

[1]The burden of undertaking this representation on a volunteer basis is extraordinary. Capital post-conviction cases are a tremendous financial, professional, and emotional drain on attorneys, both because of the hundreds of hours of time involved and the out-of-pocket expenses. (J.A. 75-76, 99, 132-34, 140-41, 150-51, 153, 156-57; Px 3)

Mr. Washington has all of his State post-conviction remedies open to him: unfortunately Mr. Washington is mentally incapable of acting in his own behalf. The Virginia Supreme Court (sic) has denied a request to appoint counsel to assist him in pursuing a petition for state habeas corpus; or to stay the mandate. Because of his indigency he cannot retain counsel.

Ms. Marie Deans, Director of the Virginia Coalition on Jails and Prisons, has spoken with well over 50 attorneys in hopes that one would assist on a *pro bono* basis. To date all of these efforts have failed.

• • •

If it is at all possible and proper it would be much appreciated if the Court would lend its guiding hand in this current dilemma.

• • •

Respectfully,

Joseph M. Giarratano

cc: Office of the Attorney General

(J.A. 11-13) In response to this plea from Death Row, Judge Merhige himself began soliciting attorneys. He was unsuccessful. (J.A. 246)

Finally, only a week before Mr. Washington's scheduled execution, when no other attorney could be found, counsel who had recently been located to assist in this action stepped in temporarily to prepare an emergency petition for writ of habeas corpus. A few days before Mr. Washington was to be electrocuted, he obtained a stay of execution. (J.A. 162, 166)

Mr. Kulp admitted at the trial below that, even though the Office of the Attorney General was aware that Mr. Washington was desperately searching for a lawyer to help him begin habeas proceedings, the Commonwealth would have electrocuted him:

> Q. If you didn't hear from Mr. Washington, you . . . were going [to] execute him whether he had a lawyer or not, isn't that correct?
>
> A. The order would have been carried out I am sure.
>
> Q. The order of execution?
>
> A. That is correct.

(J.A. 284; *see also* J.A. 289)

Mr. Kulp's candid admission was unremarkable, at the time, to him or to the Commonwealth.[2] Earl Washington was not the first unrepresented man Virginia had tried to execute before he could pursue conventional post-conviction remedies.

In 1982, Wilbert Evans sat on Death Row, without a lawyer, only one week before his scheduled execution. Like Mr. Washington, his lack of representation had prevented him from beginning habeas proceedings. (J.A. 129) His predicament, which arose before Ms. Deans came to Virginia, was also a matter of no concern to the Commonwealth. Mr. Evans's sole assistance in obtaining legal help came not from Virginia, but from the A.C.L.U. Three days before his scheduled death, a volunteer lawyer recruited 72 hours before by the Virginia Civil Liberties Union commenced state habeas proceedings and obtained a stay. (*Id.*) Ultimately, based on evidence uncovered by this attorney, the Commonwealth conceded that Mr. Evans's death sentence was unconstitutional. (J.A. 132)

The representatives of the plaintiff class in this action were similarly unable to obtain legal representation. Two weeks before the Commonwealth scheduled Mr. Washington's execution, the Virginia Supreme Court affirmed the convictions and death sentences of named Plaintiffs Richard Boggs and Johnny Watkins, Jr. As permitted by Virginia law, their appointed attorneys withdrew from representation. (J.A. 161, 165) Ms. Deans immediately began searching for volunteer lawyers to represent Messrs. Boggs and Watkins on certiorari and in state habeas proceedings – while simultaneously seeking counsel for Mr. Washington and fellow Death Row inmates Syvasky Poyner, Dana Edmunds, and Willie Leroy Jones. (J.A. 160-65)

It took Ms. Deans from June 1985 until June 1986 to find a volunteer lawyer to commence Mr. Watkins's state habeas proceedings. (J.A. 117, 161) Mr. Boggs was not so fortunate. At the time of the July 10, 1986 trial below – 13 months after his ap-

[2]Mr. Kulp's former colleagues (J.A. 275) now advise this Court that "Nothing in this record even remotely suggests that Virginia attempts to execute prisoners who do not have lawyers." (Br. at 28, n.8)

pointed attorney withdrew -- he still had no lawyer to help him begin habeas proceedings. (J.A. 164-65)

Messrs. Watkins and Boggs owe their lives to one fact -- the existence of this lawsuit. Otherwise, the Commonwealth, indifferent to their lack of representation, would have executed them.[3] In Mr. Kulp's words: "[i]f Mrs. Deans calls and says we don't have any counsel, we can't get any counsel . . . we are obviously not going to sit there from now to dooms day waiting on somebody to do something." (J.A. 289; *see also* J.A. 50-52, 366)

The circumstances of Messrs. Washington, Evans, Boggs, and Watkins typify those of indigent Virginia Death Row inmates. (J.A. 157-65, 296) James Briley waived the right to petition this Court for writ of certiorari because he had no lawyer. He did not obtain counsel until two weeks before his execution date, when a *federal* court finally appointed counsel (he had not yet commenced state habeas proceedings). (J.A. 67) Syvasky Poyner's certiorari petitions had to be drafted by another inmate. (J.A. 199-200) Moreover, at the time of trial, there were five new Death Row inmates (Messrs. Payne, Gray, Beaver, Pruitt and Correll) who would shortly need post-conviction counsel. Ms. Deans had no idea how she would find lawyers for them. (J.A. 166-67)

B. The Importance of Capital Post-Conviction Proceedings

The post-conviction proceedings that Virginia's Death Row inmates are in jeopardy of foregoing are vitally important. They achieve results that set them apart from non-capital proceedings. At trial, Plaintiffs' expert John C. Boger, who has monitored America's Death Row since 1978, estimated that more than half of all Death Row inmates obtain relief in post-conviction proceedings. (J.A. 51) While the rates of success in federal non-capital habeas proceedings are extremely low, ranging from .25% to 7%, the success rate for capital federal habeas proceedings has ranged, in the last decade, from 60 to 75%. *Barefoot v. Estelle*, 463 U.S. 880, 915 (1983) (Marshall, J., dissenting) (citing Brief for NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae);

[3]After eventually obtaining a volunteer lawyer, Mr. Boggs succeeded in vacating his death sentence in federal habeas proceedings.

Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 Am. U. L. Rev. 513, 520-21 (1988) (collecting statistics). Last year, this Court included ten capital cases in its slender docket; it decided seven in favor of the Death Row inmates.

Because of exhaustion requirements, procedural default rules, and the deference given state habeas corpus proceedings by federal courts, state post-conviction proceedings are uniquely important. Indeed, adequate representation at that stage is an integral part of federal court success. Any errors made at the state level can bar an inmate from later asserting potentially meritorious claims in either subsequent state proceedings or in federal court. (J.A. 55, 58-59, 77-78, 94)

In fact, Mr. Boger testified that "the state post conviction petition is often the most critical single document in the capital litigation." (J.A. 55) This is particularly so in Virginia, as emphasized by the Fourth Circuit. In Virginia, "all claims, the facts of which are known at the time of filing, must be included in that petition as they may not be raised successfully in a subsequent filing and those claims also could not be considered in federal court because federal courts generally may not consider claims barred by Virginia procedural rules." 847 F.2d at 1120 n.4 (citing *Whitley v. Bair,* 802 F.2d 1487 (4th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987)). The Commonwealth provides its death-sentenced prisoners with no assistance in preparing this crucial pleading.

The vital role counsel plays in these proceedings was well demonstrated by testimony at the trial of this action. Attorney Robert Hall, who represented Virginia Death Row inmate James T. Clark, described his efforts to develop a social history and psychiatric profile of Mr. Clark to demonstrate the substantial mitigating evidence available to, but ignored by, Mr. Clark's trial attorney. (J.A. 91-96; Tr. 80-84) With respect to this extensive evidence, "Mr. Clark was virtually unaware in his present mind of most of this. . . . He had no present recollection of many of the events. He had no awareness of any of it that was helpful to him that we could discern." (J.A. 96) As a result of Mr. Hall's investigation and presentation at an evidentiary proceeding, the state trial court granted Mr. Clark's petition for writ of habeas corpus.

(J.A. 96) Although the Virginia Supreme Court reversed, Mr. Clark ultimately received relief in federal court. (J.A. 96-97)

Likewise, Jonathan Shapiro, who represented Virginia Death Row inmate Wilbert Evans, conducted a far-reaching factual investigation. (J.A. 130-31) In the course of this investigation, Mr. Shapiro discovered, (1) by traveling to North Carolina, that the evidence regarding Mr. Evans's North Carolina record (offered at sentencing) included "convictions" which were not in fact convictions and, (2) by looking in the probation officer's file, that the Commonwealth's Attorney was aware, prior to trial, of that fact. (J.A. 131) In Mr. Evans's case, the Commonwealth conceded that his sentence was unconstitutionally imposed. (J.A. 132) Mr. Evans could not have obtained this result from his cell on Death Row: "Obviously no one who is confined in a four by twelve cell can do factual investigation very well." (J.A. 65) For Mr. Evans, this inability almost resulted in his execution before his constitutionally flawed sentence could be vacated -- simply because he had no lawyer to commence his state post-conviction action. (J.A. 129)

C. Capital Assistance Outside of Virginia

Of the 37 states that authorize capital punishment, eighteen provide for an absolute right to counsel in state habeas proceedings to ensure meaningful post-conviction review.[4] Seventeen of the 30 states where Death Row inmates have actually begun habeas proceedings have automatically (as a matter of law or practice) provided those prisoners with counsel to represent them in

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[4] Ariz. Rule of Crim. Proc. 32.5(b); Cal. [Government] Code § 15421(c); and [Penal] Code §1240; Conn. Superior Court Rules, Criminal Cases § 959 and Conn. Gen. Stat. Ann. § 51-296(a); Fla. Stat. Ann. § 27.702; Idaho Code § 19-4904 (1987); Ind. Post-Conviction Remedy Rule 1 § 9 (1988); Md. Ann. Code art. 27 § 645A; Mo. Rule of Criminal Procedure 24.035(e) and 29.15(e); N.J. Rules Governing Criminal Practice §§ 3:22-6, 3:27-1 and N.J. Stat. Ann. § 2A:158A-5; N.C. Gen. Stat. §§ 15A-1421, 7A-451(a), 7A-486.3; Ok. Stat. Ann. tit. 22 §§ 1089, 1360; Ore. Rev. Stat. § 138.590(3); Pa. Rule of Crim. Proc. 1503; S.D. Codified Laws Ann. § 21-27-4; Tenn. Rules of the Supreme Court 13(1); Utah Rule of Civil Procedure 65B(i)(5); Wash. Superior Court Criminal Rules 3.1(b)(2); and *Alberts v. State*, 745 P.2d 898, 901 (Wyo. 1987). *See also* Wilson and Spangenburg, *State Post-Conviction Representation of Defendants Sentenced to Death*, Judicature (to appear in the April/May 1989 issue).

preparing their habeas petitions. Wilson and Spangenburg, *State Post-Conviction Representation of Defendants Sentenced to Death*, Judicature (to appear in the April/May 1989 issue). A number of states, including Georgia and North Carolina, have also provided state funding of death penalty resource centers to ensure that their Death Row inmates have meaningful access to state post-conviction remedies. Remarks of Lewis F. Powell, Jr., Before the Criminal Justice Section, American Bar Association 8-9 (Aug. 7, 1988). For example, the North Carolina General Assembly recently appropriated $191,505 for that purpose. 1987 N.C. Sess. Laws (Reg. Sess. 1988) Ch. 1086, § 109. Even at the time of the trial in this action, Mr. Boger estimated that a full third of the death penalty states provided counsel to their Death Row inmates. (J.A. 72-73)

On the federal level, President Reagan signed into law this fall the Anti-Drug Abuse Act of 1988 requiring the mandatory appointment of counsel in federal habeas corpus proceedings for all federal and *state* prisoners under sentence of death. Pub. L. No. 100-690, 102 Stat. 4181 (1988). Earlier, the United States Judicial Conference had approved federal funding of resource centers to assist in the representation of state death row inmates in federal habeas corpus proceedings. *Guidelines for the Administration of the Criminal Justice Act (18 U.S.C. § 3006A)* App. D-2 (May 20, 1988). Such resource centers have now been funded for 13 states. Wilson and Spangenburg, *supra*.

II. THE PROCEEDINGS BELOW

At trial, the district court heard testimony from 17 witnesses, including two who qualified as experts on capital post-conviction proceedings, four other attorneys who had represented Virginia Death Row inmates in such proceedings, four attorneys responsible for counseling inmates in Virginia prisons, and two Virginia Death Row inmates. Based on this evidence, the district court found that Virginia's Death Row inmates are incapable of effectively using prison law libraries to pursue post-conviction remedies *pro se*; that the system of legal assistance provided to Death Row inmates by Virginia is inadequate to ensure meaningful access to

post-conviction remedies; and that volunteer attorneys are no longer available to carry the Commonwealth's burden.

A. Death Row Inmates Are Incapable of Proceeding *Pro Se* in Post-Conviction Proceedings

The district court first analyzed the capability of Death Row inmates to use the Virginia prison law libraries to pursue their post-conviction remedies *pro se*. It found, from uncontradicted testimony, that they cannot. This finding was based on the interplay of three specific factors: (1) "the limited amount of time death row inmates may have to prepare and present their petitions to the courts"; (2) "the complexity and difficulty of the legal work itself"; and (3) the fact that "an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims." 668 F. Supp. at 513. These findings are well-founded in the record.

Respondents' first expert witness was Mr. Boger, an attorney who has represented 60 to 80 Death Row inmates in post-conviction proceedings and has significantly assisted in the representation of 200 to 300 others. (J.A. 50) He testified that, in his entire experience, he had *never* known a Death Row inmate capable of representing himself in post-conviction proceedings. (J.A. 65) He explained:

> In matters of legal research, capital cases are particularly difficult, and although some clients are bright and could understand one stage of a proceeding sometimes, and one facet of the criminal law, very few can integrate the procedural and substantive and the constitutional questions that are needed in order to make accurate assessments of what issues have merit and what don't.
>
> • • •
>
> In . . . theory there are some death row inmates who can articulate one or two constitutional claims if given proper access to legal resources. I have never met one who could adequately prepare an entire petition that lays out a series of claims.

(J.A. 65-66, 81; *see also* J.A. 74) No contrary evidence was offered. Defendants identified not one Death Row inmate -- from Virginia

or anywhere else -- who had litigated habeas proceedings *pro se*. Nor did they offer a single witness to testify that any Death Row inmate could represent himself effectively.

Instead, Defendants only introduced evidence of the existence of law libraries at various Virginia prisons -- without regard to whether Death Row inmates even had access to those libraries. For example, at the Virginia State Penitentiary, where every Virginia Death Row inmate spends his last few weeks before execution, he is prohibited from entering a law library *at all*. (Br. at 3; J.A. 32-33; Dx 5, J.A. 339) Nor, as Petitioners admit, can Death Row inmates confined at Powhatan Correctional Center visit that prison's law library. (Br. at 3; Dx 11, J.A. 346) Only Death Row inmates confined at Mecklenburg Correctional Center can even enter a law library. There, locked in cages, they may ask an untrained clerk for one book at a time. No direct access to lawbooks, or browsing, is permitted. Mecklenburg Death Row inmates are permitted this "privilege" a maximum of twice per week (depending on the needs of almost 40 other Death Row inmates) for a maximum of two and one-half hours per visit. (J.A. 207, 264-67, 321-22, 358)

Under such conditions, skilled lawyers could not conduct the legal research necessary for litigating a capital habeas proceeding. But we are not talking about the capability of lawyers. Virginia asks this Court to conclude that an Earl Washington, confined a few feet from the chair in which he will die within two weeks, can master capital habeas proceedings in time to defeat the Commonwealth in litigation.

1. The Time Constraints of Capital Habeas Cases

The district court found that Death Row inmates have only a "limited amount of time . . . to prepare and present their petitions to the courts." 668 F. Supp. at 513. (*See also* J.A. 58, 64-65, 97-98, 146-51) Once an execution date is set -- which, in Virginia, can happen "at any time" after affirmance by the Virginia Supreme Court -- the condemned must be prepared to conclude *all* of his post-conviction remedies before that date. 668 F. Supp. at 513. Of course, no non-capital inmate must face that kind of time schedule.

For example, immediately after the Virginia Supreme Court rejected Richard Whitley's appeal from a denial of state habeas relief, the Commonwealth scheduled his execution. He had one month to conduct his entire federal post-conviction litigation. (J.A. 145-48) His volunteer attorney, Timothy Kaine, testified that he managed to file a habeas petition in federal district court within two weeks. (J.A. 148) Fifteen days later (six days before the execution date), the district court dismissed the habeas petition and denied motions for a stay and for a certificate of probable cause. (J.A. 149) Mr. Kaine was therefore constrained to fly to Abingdon, Virginia to try to obtain a certificate of probable cause and a stay of execution from a Fourth Circuit judge. He succeeded -- after 140 hours of work in a 10-day period -- four days before Mr. Whitley's scheduled execution. (J.A. 150-51)

Mr. Boger testified, again without contradiction, that the *Whitley* schedule, both in state and federal courts, is common:

> I know plenty of lawyers that have been involved with an execution date facing them and in a 30 or 45 day period before execution who have been unable to get stays in court after court. What that typically involves is 30 days of virtual around the clock work. A lawyer will take a case Monday May First and at [the] end of May they will have done no other work except litigate in five or six courts.

(J.A. 64) In addition, Attorney Jonathan Shapiro described his frantic struggle to file an ultimately successful first state habeas petition after he took on Wilbert Evans's case just days before Mr. Evans's scheduled execution. (J.A. 129-30) Similarly, Ms. Deans related the frenzied, night and day efforts counsel devoted on behalf of Mr. Washington. (J.A. 162) A Death Row inmate could hardly be expected to do so much for himself in so little time.

Moreover, the Virginia Attorney General's Office imposes its own abrupt deadlines even in the absence of an execution date. It threatens to schedule the executions of *unrepresented* inmates if no action is taken by those inmates within 30 days. (J.A. 193, 349-50) Even while seeking a stay of the mandate of the Fourth Circuit's *en banc* decision, Petitioners saw nothing wrong in advis-

ing an unrepresented Death Row inmate (in the third paragraph of a letter addressed to somebody else) that unless he took some action (that they did not explain how to do) within 30 days, they would schedule his execution. (J.A. 366)

Petitioners offered no evidence that the constraints of litigating in the shadow of execution dates and arbitrary threats of immediate execution do not impede Death Row inmates' ability to represent themselves.

2. The Complexity of Capital Cases

The evidence is uncontradicted that capital habeas proceedings are a complicated, difficult area of the law.[5] (J.A. 53, 65, 112, 231) An attorney who meticulously litigates every known argument may still waive his client into the electric chair if he does not anticipate a potential change in the substantive law. (J.A. 58, 82, 99) Or, due to a misunderstanding over rules regarding exhaustion of state remedies, procedural default, stays of execution, or abuse of the writ, he can become bogged down in a procedural morass that seemingly prevents any court from hearing his client's claim. (J.A. 58, 61, 63, 139, 151, 281-82) A *pro se* inmate, however, is all but certain -- when litigating under severe time pressure and emotional stress -- to make substantive or procedural mistakes that will irreparably prejudice his rights and bar collateral review -- regardless whether he is later represented by counsel.

Virginia's Death Row inmates resemble Virginia non-capital inmates in one respect: They do not understand what their rights are, or where their remedies lie, much less how and when to vindicate them. (J.A. 114-16, 198-99, 200, 202, 211) Death Row inmates differ drastically, however, in that they do not have the luxury of time to educate themselves. Plaintiff Johnny Watkins testified:

> Q. Do you know whether your case went to any other courts after the Virginia Supreme Court?

[5] The six attorneys who testified at trial regarding their representation of Virginia Death Row inmates in post-conviction proceedings unanimously agreed that such proceedings are extremely time consuming even for lawyers. Experiences ranged from 250 hours (for a case still in progress) to 1,000 hours. (J.A. 64-65, 100, 133, 140, 150-151) The one commodity that a Death Row inmate may not have is time.

> A. I think it went up, it went to another court, but I don't know exactly which one.
>
> • • •
>
> Q. Do you know what court you go to next?
>
> A. No.
>
> Q. Do you know what step you take next to appeal your case?
>
> A. No.

(J.A. 115-16; *see also* J.A. 125-26) Mr. Watkins' bewilderment is understandable. And yet, to save his life, he must obtain instant enlightenment.

In addition to their inability to follow or plan procedural strategies, Death Row inmates also lack the ability to master the substantive legal issues of death penalty litigation. Mr. Boger testified:

> It is not the case that because one can file one fourth amendment claim or one fifth Amendment confession claim after a great deal of work if one is a bright, unusually bright criminal defendant that one can integrate that [claim] into a series of 8 or 10 or 13 constitutional claims that may need to be presented.

(J.A. 81) Indeed, Plaintiffs Watkins and Boggs were incapable of using a law library to prepare, not only their petitions for writ of certiorari, but even a motion to this Court for an extension of time. (J.A. 202) Even Joseph Giarratano, to whom Petitioners continually point for his ability to litigate straightforward civil matters, is helpless to spot the issues of a capital case:

> I can't pick an issue out of a transcript without Marie's help.
>
> • • •
>
> If you mean can I read it and understand it, as far as drawing out legal issues if there is a glaring violation of a Miranda violation I could pick that up, but beyond that, no.
>
> A clear cut issue I couldn't tell you one from another.

(J.A. 201, 207-08; *see also* J.A. 65-66, 81) Mr. Giarratano does not represent himself in his capital habeas proceedings.

In sum, the inabilities of inmates to research even simple issues was best characterized by Virginia itself:

> The fact is inescapable that the average prison "writ writer" is, in spite of protestations to the contrary, uneducated, of borderline intelligence and often antagonistic towards the legal system which he views as responsible for his present predicament. . . . It is submitted that furnishing prison inmates with an extensive legal library would be an exercise in futility, especially where the object of the exercise is to provide meaningful access to the courts.

Brief of the Commonwealth of Virginia as Amicus Curiae in Support of Petitioners, at 8, *Bounds v. Smith*, 430 U.S. 817 (1977). (J.A. 299, 300) A Death Row inmate operating under circumstances and stresses unknown to the average inmate could hardly be expected to do better.

3. The Emotional Toll of Death Row

Finally, the district court found that "at the time the inmate is required to rapidly perform the complex and difficult work necessary to file a timely petition, he is the least capable of doing so." 668 F. Supp. at 513. He is at that time preparing himself and his family for his death -- a task inconsistent with fighting for his life. As Mr. Boger explained, based on 10 years of experience:

> Finally, and I think that is perhaps unique to capital inmates in my experience, the prospect of facing death or having to come to terms with an execution date or a date certain for one's demise is [a] seriously enough involving and challenging emotional and personal crisis that even an inmate who was a law graduate and who otherwise had the capability to do legal and factual research, probably does not have the detachment and dispassion to litigate under those circumstances. I have had lots of clients in those last 60 day time periods, and what they are forced to do is to prepare themselves mentally and spiritually and emotionally to deal with their family and

> their children, all of whom see them as about to die. And that is a full time job.
>
> And very few of them, I think, even have the emotional resources to talk with you meaningfully at that point about their case. Much less to take it over.

(J.A. 66; *see also* J.A. 81-82, 152) Other witnesses testified, also without contradiction, about Virginia Death Row inmates whose mental and psychological conditions prevented them from assisting their attorneys -- much less effectively pursuing post-conviction remedies *pro se*. (J.A. 93, 96, 200, 202) No contrary evidence was offered.

From this and other unrefuted testimony, the district court found that "the plaintiffs are incapable of effectively using lawbooks to raise their claims. Consequently, the provision of a library does little to satisfy Virginia's obligation to 'assist inmates in the preparation and filing of meaningful legal papers' with respect to Virginia death row prisoners. *See Bounds, supra,* 430 U.S. at 828. Accordingly, Virginia must fulfill its duty by providing these inmates trained legal assistance. *Id.*" 668 F. Supp. at 513.

B. The Commonwealth's Provision of Attorneys for Post-Conviction Proceedings Is Inadequate

Judge Merhige next turned to the question whether Virginia provides adequate legal assistance for post-conviction proceedings. He found the two alleged forms of such assistance -- part-time, counseling lawyers appointed to Virginia prisons under Va. Code § 53.1-40, and the theoretical availability of court-appointed attorneys under Va. Code § 14.1-183 -- insufficient.

1. The Institutional Attorneys Do Not, and Cannot, Provide Legal Representation in Capital Post-Conviction Cases

Underlying any discussion of the role -- or even the availability -- of institutional attorneys for capital habeas cases is one critical consideration: The concept is entirely hypothetical. Until this lawsuit was initiated, everybody in Virginia -- from the Attorney General's Office to Death Row inmates to Marie Deans to the prison attorneys themselves -- held the firm belief that these attorneys did not do capital habeas cases. The idea that they could

be so utilized sprang sheerly from the imaginations of those searching for a defense to this lawsuit.

Regardless of the accuracy of Petitioners' belated predictions about the role of institutional attorneys, one stark fact remains indisputable. As the district court found (668 F. Supp. at 514), in the twelve years such attorneys have been kibbitzing with prisoners, not one of them has *ever* prepared a petition for writ of habeas corpus (state or federal) or a petition for writ of certiorari for a Death Row inmate. (J.A. 180, 182, 224-25, 229-30, 258)

Harry Montgomery, the institutional attorney at Mecklenburg Correctional Center, testified that until this action began, Death Row inmates were considered outside his "jurisdiction": "[T]he attorney situation in death row is a matter which [h]as generally been under the jurisdiction of Marie Deans, Your Honor, to be quite honest." (J.A. 229; *see also* J.A. 230) Accordingly, Mr. Montgomery flatly advised Death Row inmates over the years that he did not do capital habeas cases:

> Q. And what did Mr. Montgomery say to you?
>
> A. He told me that he didn't handle that, he weren't handling death row cases, so I would have to prefer (sic) to my lawyers I had before.

(J.A. 119) The Commonwealth concurred. Virginia's chief death penalty lawyer, Mr. Kulp, testified that he too looked -- not to the prison lawyers -- but to Ms. Deans. (J.A. 283, 285, 288-89)

Not until four months after this litigation was begun did Ms. Deans, who has recruited lawyers for Virginia Death Row inmates since 1983, learn of the Commonwealth's new-found plans for institutional attorneys:

> THE COURT: Miss Deans, did you realize that these . . . attorneys appointed for the various institutions were available to actually draw pleadings?
>
> A. No, sir, I did not.
>
> • • •
>
> THE COURT: And did you have a contrary under standing prior to [a November 1985 meeting with Mr. Kulp]?

> A. Yes, sir, I did.

(J.A. 295) Petitioners concede that Mr. Montgomery did not begin even to monitor Death Row until 1985; Mr. Montgomery admits that he did so in response to this lawsuit. (Br. at 5; J.A. 229)

The very language of the statutory provision for institutional attorneys, Va. Code § 53.1-40, requiring the attorneys to "counsel and assist," falls short of permitting representation. Lest there be any doubt, the Commonwealth strictly admonished its prison lawyers in several memos that their role is only advisory. (J.A. 302, 334, 335) Similarly, the Commonwealth has expressly instructed its institutional lawyers that they may devote only nominal time to each inmate: "It is not contemplated that the type of matters to be handled under this Code Section should require any great amount of time for any one prisoner." (J.A. 303) At least at the State Penitentiary, the maximum time allowed per prisoner is *one hour.* (J.A. 178-79)

Heeding these repeated admonitions, Virginia's institutional lawyers have gleaned a clear understanding of their role: "[W]e are supposed to . . . be kind of like a talking law book. We are supposed to substitute for a decent law library." (J.A. 178) Consequently, prison lawyers do not represent inmates; do not appear in court; do not serve as counsel of record; do not perform factual investigations; do not normally draft pleadings, and never sign them. (J.A. 178-79, 180, 219-20, 235, 251, 255, 258, 302-03, 331; Tr. 375-76) And not one of them has *ever* drafted a habeas petition for a Death Row inmate.

In addition to the Commonwealth's express directions, there are practical restraints preventing the prison lawyers from representing Death Row inmates. A total of seven such attorneys, all of whom additionally have full-time private practices, are responsible for advising almost 2,000 inmates. (J.A. 176, 178, 183, 217, 222-23, 226-27, 253, 254-55, 262-63; Tr. 314) The attorneys conceded that devoting the hundreds of hours required to represent even one Death Row inmate in a capital habeas proceeding would wreak havoc on their solo practices. (J.A. 183, 186, 231, 262-63) They categorically agreed that handling *more* than one such case would be impossible. Yet the Virginia Supreme Court, which af-

firms death sentences in groups of two or three, has affirmed fifteen such sentences in the 30 months since the trial. (Br. at 2 n.1)

Death Row inmates who have sought help from the institutional attorneys have been firmly rebuffed. When Mr. Giarratano and Ms. Deans sought assistance in preparing certiorari petitions for Syvasky Poyner, Mr. Montgomery told Mr. Giarratano that "he didn't know anything about certs. and it [sic] really wasn't much he could do except get copies of case law." (J.A. 200) He told Ms. Deans that "he and Joe were in the same boat, that he had never done a cert. petition." (J.A. 293) At trial, Mr. Montgomery first denied that he had been asked to help prepare Mr. Poyner's papers (J.A. 232, 247), then lamely explained that he thought Mr. Giarratano was being "facetious." (J.A. 249; *see also* J.A. 205-06)

Although he was aware that Earl Washington had an impending execution date and no lawyer (J.A. 204), Mr. Montgomery did nothing. (J.A. 245-46) When the Commonwealth ultimately took Mr. Washington to Richmond to die, Mr. Montgomery washed his hands of the problem; Mr. Washington was out of his "jurisdiction." (J.A. 246-47)

There is no better indicia of the unavailability of assistance from prison lawyers than the cases of Messrs. Watkins and Boggs. During the full year between the filing of this action and the trial, Messrs. Watkins and Boggs sat on Death Row without habeas counsel. (J.A. 161, 165) Nine months before the trial, Mr. Giarratano filed a written grievance with the Virginia Department of Corrections begging that, if permitted by law, the institutional attorneys assist them. (J.A. 315-17) Petitioners were thus given a golden opportunity to disprove all doubts about institutional attorneys.

The Commonwealth's response was to ignore the request. (J.A. 203) Mr. Montgomery's reaction was to put off working for Mr. Boggs on grounds that he "in no way want[s] to discourage anyone else from obtaining a volunteer attorney," and to reject Mr. Watkins because he "didn't handle . . . death row cases." (J.A. 244, 119) No one did anything to assist Messrs. Watkins and Boggs. (J.A. 119-20, 203, 240-45)

Judge Merhige correctly assessed the actual assistance that institutional attorneys could provide Death Row inmates in post-conviction proceedings:

> The scope of assistance these attorneys provide is simply too limited. . . . They act only as legal advisors or, to borrow the phrase of one such attorney, as "talking lawbooks." . . . For death row inmates, more than the sporadic assistance of a "talking lawbook" is required to enable them to file meaningful legal papers.

668 F. Supp. at 514. *See also* 847 F.2d at 1120.

2. The Possibility of Obtaining Court-Appointed Counsel is Insufficient to Secure the Rights of Death Row Inmates

The district court next considered the possibility of a Death Row inmate's securing court-appointed attorneys pursuant to Va. Code § 14.1-183, and found:

> [T]he timing of the appointment is a fatal defect with respect to the requirements of *Bounds*. Because an inmate must already have filed his petition to have the matter of appointed counsel considered, he would not receive the attorney's assistance in the critical stages of developing his claims. *See Bounds, supra*, 430 U.S. at 828 n.17, 97 S.Ct. at 1498 n.17. Consequently, attorneys appointed pursuant to this statute are, by reason of the lateness of the appointment, unable to provide all of the required assistance.

668 F. Supp. at 515.

The district court's finding is based on the fact that there is legal authority for the guaranteed appointment of counsel only if the Death Row inmate has: (1) prepared and filed a petition, (2) survived a motion to dismiss, *and* (3) convinced a court that the issues raised by the petition are "substantial" and require an evidentiary hearing. *Darnell v. Peyton*, 208 Va. 675, 160 S.E.2d 749 (1968). The Virginia Supreme Court has confirmed that appointment under § 14.1-183 is at all other times wholly discretionary. *Darnell*, 208 Va. at 677, 160 S.E.2d at 750; *Howard v. Warden, Buckingham Correctional Center*, 232 Va. 16, 19, 348 S.E.2d 211,

213 (1986); *Cooper v. Haas*, 210 Va. 279, 281, 170 S.E.2d 5, 7 (1969). As Mr. Kulp, Senior Assistant Attorney General, said, "the case law is clear." (J.A. 280)

The evidence at trial confirmed that there is no authority for appointment of counsel prior to the filing of a habeas petition, and that appointment at a later stage is erratic. Petitioners did not offer evidence of a single instance in which, prior to the filing of a petition, an unrepresented inmate was appointed counsel. Respondents are aware of none. The two instances cited by Petitioners as examples of such appointments are hardly persuasive. In both cases, the court merely appointed volunteers recruited by Ms. Deans (and for one, appointment came only *after* the petition was filed). (J.A. 109, 191, 325, 326-27) For an inmate such as Earl Washington (pp. 2-5 *supra)*, who cannot find a volunteer to take his case, these examples are meaningless.

In addition, the record reveals six cases -- including one of the two instances Petitioners cite where counsel was in fact appointed -- in which the Commonwealth *opposed* appointment. (J.A. 98, 133, 138-39, 190-93, 323-24, 326-28) The Commonwealth, which at the time of trial had twelve lawyers representing it in capital post-conviction proceedings (Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law, Ex. 3), has been quite successful in arguing that its adversaries should not have lawyers: The record included three instances in which Virginia state courts denied motions for appointment of post-conviction counsel (J.A. 101, 191, 192, 314, 329), and three times when a Virginia federal court denied appointment. (J.A. 193, 297-98)

In short, prior to the filing of a state habeas petition, there is no provision of counsel. Later, counsel may be appointed, but often is not.

3. Meaningful Access Requires the Continuous Services of an Attorney

Finally, the district court found that even if one assumed, contrary to the evidence, that the assistance of institutional attorneys and court-appointed counsel were definitely available, this combined assistance is still not adequate to provide meaningful access to state post-conviction remedies:

> The matter of a death row inmate's habeas corpus petition is too important -- both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved -- to leave to, what is at best, a patchwork system of assistance. These plaintiffs must have the continuous assistance of counsel in developing their claims.

668 F. Supp. at 515. Because of the unique circumstances of capital post-conviction proceedings, the district court concluded that "only the continuous services of an attorney to investigate, research, and present claimed violations of fundamental rights provides them the meaningful access to the courts guaranteed by the Constitution." 668 F. Supp. at 514.

As described above (pp. 12-17), the complexity of capital cases in light of the time constraints and emotional toll of Death Row requires that a lawyer research and present a Death Row inmate's claims. (*See also* J.A. 67) But, in addition, only a lawyer can conduct the type of factual investigation that is of special importance in capital post-conviction proceedings. (J.A. 57, 65) As Mr. Boger testified, a complete factual investigation is necessary "because in the vast majority of cases where that kind of factual research is done serious constitutional errors in our experience have emerged." (J.A. 55)

"Continuous" services are vital because, as Mr. Boger stated, if a Death Row inmate changes counsel,

> As a practical matter it is a disaster. It is almost unthinkable, because as I described the process of investigating both legal and factual, one must do a lot of research, and unless one writes memos to the files on every item, every witness one talks with, every item of information one obtains, that becomes part of the common fund of knowledge and memory that may form a later judgment about what is a good legal issue or what the factual point to pursue is. That all gets lost if new counsel comes in that hasn't done that work.

(J.A. 64) Plaintiffs' second expert witness, Robert Hall, expressed the same opinion. (J.A. 102, 111-12) Moreover, in a capital case, the courts will very rarely be willing to allow a new lawyer the same "start up" time -- to become familiar with the case -- that they might allow in an ordinary civil case. (J.A. 80) Thus, because of the shortness of time and the factual and legal complexity, changing lawyers at just the federal courthouse door -- to say nothing of multiple changes in counsel prior to that point as anticipated by Petitioners (J.A. 272-73, 280-81, 286; Dx 19) -- would have, as the district court found, "catastrophic effects." 668 F. Supp. at 517.

C. Volunteer Attorneys Are Not Available in Virginia To Meet the Needs of Death Row Inmates

Having found that Virginia lacks a system that provides meaningful access to post-conviction remedies for indigent Death Row inmates, Judge Merhige considered whether volunteer lawyers are available to assume post-conviction representation. He found that they are not:

> The evidence conclusively establishes that today few -- very few -- attorneys are willing to voluntarily represent death row inmates in post conviction efforts.... In view of the scarcity of competent and willing counsel to assist indigent death row inmates in their exercise of seeking post conviction relief, some relief is both necessary and warranted.

668 F. Supp. at 515.

The consequence of the lack of volunteers is that inmates are unable to file state post-conviction proceedings for extended periods of time. The effect of such delays, Judge Merhige found, "may be devastating." 668 F. Supp. at 515 n.2. And, as previously outlined, the volunteer system completely failed with regard to Earl Washington. Thus, if Virginia's Death Row inmates are left to rely solely on volunteer counsel, there can be no meaningful access -- and no post-conviction review -- for them.

SUMMARY OF ARGUMENT

The courts below painstakingly followed the directions laid down by this Court in *Bounds v. Smith*, 430 U.S. 817 (1977). The

district court conducted a thorough factual inquiry into the special needs of Virginia Death Row inmates in state post-conviction proceedings, the assistance provided by the Commonwealth, and the adequacy of this assistance to provide meaningful access. Based on these facts and further evidence of the critical importance of representation in such proceedings, the district court found that representation is required to ensure meaningful access. The court, exercising its discretion, thereupon ordered Virginia officials to develop a program or system for providing representation prior to the filing of a state habeas petition -- "a slight modification of the current assistance." 668 F. Supp. at 515. The district court's findings, conclusion, and remedy all comprise a conventional application of *Bounds* in an extraordinary context. Nothing in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the case on which Petitioners base their appeal, suggests that such analysis is improper or that district courts have no power to grant such relief.

Petitioners now demand that this Court retry the case. The Court need not, however, determine what it would have decided had it observed the witnesses, listened to their testimony, and sifted through the documentary evidence. This Court held in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), that such responsibilities are the province of the district courts; appellate courts may not usurp their power.

With neither the law nor the facts on their side, Petitioners resort to conjuring up a weary parade of horribles that the decisions below will allegedly encourage. Yet, in suggesting that the provision of meaningful access will lead to endless challenges of the effectiveness of post-conviction counsel, Petitioners conveniently ignore their oft-cited *Finley* case. In *Finley*, this Court flatly prohibited such challenges unless based on a right to counsel -- not a right of meaningful access. Petitioners' further fears -- that forcing the Commonwealth to litigate against lawyers instead of against unrepresented Death Row inmates could impede the expeditious administration of executions -- are similarly unfounded. States that provide counsel have not been stymied from executing some of those lawyers' clients.

Moreover, there are independent, alternative bases to support the decisions below. The evolving standards of decency underlying the Eighth Amendment would in 1989 be offended by executions of those who cannot begin habeas proceedings because they are unrepresented. Finally, any weighing of the private versus the public interests in light of the risks of an erroneous execution without such representation, pursuant to the due process clause of the Fourteenth Amendment, mandates the provision of counsel.

ARGUMENT

I. IN ORDER TO OBTAIN THE MEANINGFUL ACCESS TO STATE POST-CONVICTION PROCEEDINGS GUARANTEED BY *BOUNDS v. SMITH*, DEATH-SENTENCED PRISONERS MUST BE REPRESENTED BY COUNSEL

In *Bounds v. Smith*, 430 U.S. 817, 828 (1977), this Court emphatically reaffirmed that inmates have a "fundamental constitutional right of access to the courts." This right requires states to provide all prisoners with "adequate law libraries or adequate assistance from persons trained in the law." *Id.*

The right of meaningful access is the most important right a prisoner holds; without it, he has no means of securing any other rights. *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973). For Death Row prisoners seeking to begin habeas proceedings, this right to petition the courts has unique significance: It has meant the difference between life and death for more than half of those who have exercised it. (*Supra* at 7-8)

Petitioners insist, however, that this "fundamental right" may be satisfied with form instead of substance. Seizing upon this Court's use of the disjunctive in describing acceptable remedies, they urge that if a state provides a law library, that ends all inquiry: No court may look beyond the fact of the library's existence to determine whether *all* inmates are actually receiving meaningful access to the courts. In other words, a blind prisoner would have to make do with a law library filled with books he could not read.

Not surprisingly, neither this Court nor any of the lower courts construing *Bounds* has ever adopted Petitioners' formalistic interpretation of the right of access to the courts. To the contrary, *Bounds*, its ancestors, and its progeny squarely reject Petitioners' approach in favor of an analysis that focuses on whether a state's program of assistance *in fact* provides meaningful access for all prisoners, including those with special disabilities and circumstances.

Indeed, this Court made quite clear in *Bounds* that, grammatical connectors notwithstanding, the existence of a law library does not necessarily ensure meaningful access. Specifically, this Court identified two cases where it had held that -- despite the existence of presumably adequate law libraries -- certain classes of inmates were deprived of access to the courts. *Id.* at 824 and nn.10, 11 (citing *Wolff v. McDonnell*, 418 U.S. 539 (1974) (granting relief even though "there was already an adequate law library in the prison") and *Procunier v. Martinez*, 416 U.S. 396 (1974) (granting relief "even though California has prison law libraries")). Thus, no reading of *Bounds* supports the contention that a state may furnish a law library and automatically be done with ensuring meaningful access.

This Court further emphasized in *Bounds* that providing "access to the courts" for some, or even most, inmates is not enough. That access must extend to "*all* prisoners" and it must be "adequate, *effective*, and meaningful." *Id.* at 822, 824 (emphasis added). For example, *Bounds* distinguished "the access rights of ignorant and illiterate inmates . . . unable to present their own claims in writing to the courts" from those of "inmates able to present their own cases." *Id.* at 823-24. This Court noted that for illiterate inmates, a law library alone is not sufficient -- meaningful access "require[s] *at least* allowing assistance from their literate fellows." *Id.* (citing *Johnson v. Avery*, 393 U.S. 483 (1969)) (emphasis added).

Following *Bounds*, the Courts of Appeals have also recognized that under certain circumstances, inmates may require more assistance than a law library.[6] In so doing, these courts have carefully adhered to this Court's instructions that "[a]ny plan, however,

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[6] Thus, the Third, Fourth, and Fifth Circuits have all acknowledged that a library alone may not provide meaningful access for illiterate or non-English speaking inmates or prisoners in close custody. *See Valentine v. Beyer*, 850 F.2d 951, 956-57 (3d Cir. 1988) (affirming district court's order prohibiting the state

must be evaluated as a whole to ascertain its compliance with constitutional standards." *Bounds*, 430 U.S. at 832.[7]

A. The Decisions Below Represent a Conventional Application of *Bounds* Jurisprudence

This case presents the ultimate question of "meaningful access to the courts." It involves condemned prisoners in Virginia, laboring under severe constraints unique to Death Row, who will forever lose their opportunity to be heard if they fail to promptly file state habeas corpus petitions. As Justice Brennan noted in *Furman v. Georgia*, 408 U.S. 238 (1972), inmates who are executed lose "the right to have rights"; dead prisoners are permanently deprived of "the right of access to the courts." 408 U.S. at 290. No right to assistance "in the preparation and filing of meaningful legal papers" can therefore be so important as the right of a Virginia Death Row inmate to file a state habeas petition, the "most

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from closing a paralegal clinic, based on the district court's factual findings regarding the assistance provided by the clinic, the inadequacy of the State's proposed plan, and the special needs of close custody, illiterate, and non-English speaking inmates); *Cruz v. Hauck*, 627 F.2d 710, 721 and n.21 (5th Cir. 1980) (holding that "[l]ibrary books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate," and ordering the district court to "look at all the circumstances to determine whether *all* inmates have meaningful access to the courts") (emphasis original); *Harrington v. Holshouser*, 741 F.2d 66, 69 (4th Cir. 1984) (requiring program of trained paralegals in addition to law libraries).

[7] The district courts have reached the same conclusion. *See Hadix v. Johnson*, 694 F. Supp. 259, 288-89 (E.D. Mich. 1988) (requiring prison legal services program for illiterate inmates and those in segregation); *United States ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1104-06 (E.D. Pa. 1987), *aff'd without opinion*, 835 F.2d 285 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988) (requiring paralegal clinic in addition to law library to assist illiterate inmates and those in administrative or disciplinary custody); *Knop v. Johnson*, 655 F. Supp. 871, 882 (W.D. Mich. 1987) (illiterate inmates not provided with meaningful access by law library); *Cody v. Hillard*, 599 F. Supp. 1025, 1061 (D.S.D. 1984) (requiring "law-trained assistance" in addition to law library); *Kendrick v. Bland*, 586 F. Supp. 1536, 1549, 1551 (W.D. Ky. 1984) (law library alone "does not provide the minimum necessary legal resources"); *Wade v. Kane*, 448 F. Supp. 678, 684 (E.D. Pa. 1978), *aff'd mem.*, 591 F.2d 1338 (3d Cir. 1979) ("[I]t is obvious that a prison library, even where it is adequate, is insufficient to provide [adequate] access for inmates who are illiterate or otherwise unable to do effective legal research.").

critical single document in the capital litigation." 430 U.S. at 828. (J.A. 55)

As this Court recognized in *Bounds*, the amount of legal assistance required for meaningful access varies depending on the nature of the proceeding. Thus, this Court found that prisoners filing "original actions seeking new trials, release from confinement, or vindication of fundamental civil rights" need more assistance in obtaining adequate, meaningful, and effective access to the courts than prisoners asking a court to exercise discretionary review of lower court decisions. 430 U.S. at 827-28. Such original proceedings, "the first line of defense against constitutional violations," require additional legal assistance because of their "fundamental importance." *Id.* at 827.[8]

Habeas proceedings in *capital* cases, however, are more than the first line of defense against constitutional violations; they are also the last. The outcome of such proceedings, if allowed to occur, will determine whether the prisoner lives or dies. The exponentially magnified importance of habeas proceedings, and the nature and degree of risk to Death Row inmates if these proceedings cannot take place, cry out for a heightened level of legal as-

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[8] In requiring legal assistance in *Bounds*, this Court also considered the fact that habeas proceedings "frequently raise heretofore unlitigated issues." The importance of this factor is also magnified in Virginia capital habeas proceedings. In these proceedings, Death Row inmates seek to assert claims that have not been, and could not have been, addressed on direct appeal -- claims that will determine whether a death sentence was properly imposed. As this Court noted in *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986), asserting claims of ineffective assistance of trial counsel in post-conviction proceedings is frequently the only means through which an accused can effectuate the right to counsel and is the *only* means of enforcing the right to effective assistance of appellate counsel. In addition, potentially meritorious constitutional claims omitted at trial -- and therefore not heard on appeal, Va. Supreme Court Rule 5:25 -- or on appeal will only be reviewed, if ever, in post-conviction proceedings as instances of ineffective assistance of counsel or upon a showing of cause and prejudice. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986) (with respect to claims omitted by counsel, "[t]here is an additional safeguard against miscarriages of justice in criminal cases. . . . That safeguard is the right to effective assistance of counsel."). Finally, prosecutorial misconduct in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), will rarely appear in the record; challenges under *Brady* are therefore usually raised for the first time in habeas proceedings.

sistance. Accordingly, Judge Merhige found that "[t]he stakes are simply too high" to permit the Commonwealth to get by with minimal access.

In reaching this conclusion, the district court examined whether, in light of the fundamental importance of these proceedings, Virginia Death Row inmates were capable of using law libraries to obtain a meaningful opportunity for collateral review. The court focused on the tasks facing condemned prisoners in these proceedings and on limitations affecting their ability to perform those tasks. *See Bounds*, 430 U.S. at 825:

> It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.

For Virginia's Death Row inmates, the uncontradicted evidence demonstrated that the work necessary for filing and litigating a state habeas petition in a capital case is far more difficult and substantial than the tasks outlined in *Bounds* (tasks which required only a law library), including extensive factual investigation, identification and research of numerous substantive claims (in a rapidly changing area of the law) and negotiation of the complicated procedural obstacles. The district court found, however, that not only is such work extremely complex, but this "large amount of legal work must be compressed into a limited amount of time." 668 F. Supp. at 513. And this work, which is directed toward staying alive, must be accomplished at a time when the inmate is preparing to die. *Id.* The district court found that these circumstances disable Death Row inmates from proceeding *pro se* in habeas proceedings:

> [P]laintiffs are incapable of effectively using lawbooks to raise their claims. Consequently, the provision of a law library does little to satisfy Virginia's obligation to "assist inmates in the preparation of meaningful legal papers" with respect to Virginia death row prisoners. *See Bounds, supra*, 430 U.S. at 828.

Id. Indeed, Defendants offered no evidence otherwise.

Under *Bounds*, if a law library is not sufficient to provide adequate, effective, and meaningful access, then the State must provide "adequate assistance from persons trained in the law." 430 U.S. at 828. The district court therefore reviewed the capability of Virginia's alternate forms of assistance to ensure adequate, effective, and meaningful access. *See Valentine v. Beyer*, 850 F.2d 951, 956-57 (3d Cir. 1988) (examining adequacy of state's proposed plan of alternative assistance); *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) (ordering district court to examine adequacy of alternative forms of assistance). It found that this additional assistance, when evaluated as a whole, as required by *Bounds*, still did not assure adequate, effective, and meaningful access for Death Row inmates, in light of the extraordinary importance of the remedies they sought to pursue:

> The matter of a death row inmate's habeas corpus petition is too important -- both to society, which has a compelling interest in insuring that a sentence of death has been constitutionally imposed, as well as to the individual involved -- to leave to, what is at best, a patchwork system of assistance.

668 F. Supp. at 515. The court thus followed precisely the analysis laid out in *Bounds* and subsequent decisions: In evaluating the importance of the proceedings and the actual capabilities of Plaintiffs, the district court focused, as mandated by *Bounds*, on whether Plaintiffs *in fact* receive meaningful access. This was, therefore, a faithful application of *Bounds* principles in a unique context.[9]

B. The Assistance of Lawyers is an Appropriate Remedy Under *Bounds*

Petitioners' real dissatisfaction with the decisions below is not the courts' application of the *Bounds* principles, but the

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[9] The sole case cited by Petitioners in support of their remarkably restrictive reading of *Bounds*, *Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985), must be viewed in light of its actual holding: "We hold the district court erred in requiring

remedy. Once a district court finds a constitutional violation, however, it has broad discretion to fashion appropriate relief. As this Court said in *Hutto v. Finney*, 437 U.S. 678 (1978), "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Id.* at 687 n.9 (quoting *Millikin v. Bradley*, 433 U.S. 267, 281 (1977)).

The district court, after finding that Defendants' law library failed to ensure meaningful access for Death Row inmates, was then obligated "using the alternatives set out in *Bounds* [to] fashion a remedy which, under the circumstances . . . [would] provide meaningful relief." *Battle v. Anderson*, 457 F. Supp. 719, 737 (E.D. Okla. 1978), *remanded on other grounds*, 594 F.2d 786 (5th Cir. 1979). The Court in *Bounds* enumerated various means by which a state could provide such assistance. *Id.* at 830-32. The district court concluded, on the basis of the factual record before it regarding capital post-conviction proceedings, that only the continuous services of an attorney would ensure the access required by *Bounds*. It further concluded that Virginia did not currently provide that assistance.

Nevertheless, rather than imposing on Virginia any particular mechanism for providing this assistance -- as Defendants claim -- the court gave Defendants the discretion to propose the form such assistance should take. Noting that "only a slight modification of the current assistance" was necessary, 668 F. Supp. at 515, the court simply ordered Defendants to develop "a system" or "a program" that would ensure that each Death Row inmate was individually represented by a lawyer. (Pet. at A-23, -33) This was the very approach approved in *Bounds* itself:

> Petitioners' hyperbolic claim [of a federal intrusion into state authority] is particularly inappropriate in this case, for the courts below scrupulously respected the limits

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that *any* Florida library plan, devised to ensure constitutional access to the Courts by state inmates, must include a provision for attorney assistance." *Id.* at 1438 (emphasis original). In *Hooks*, the district court had issued the broadest possible order, requiring the assistance of lawyers for all inmates for all types of cases.

> on their role. The District Court initially held only that petitioners had violated the "fundamental constitutional guarantee," ibid., of access to the courts. It did not thereupon thrust itself into prison administration. Rather, it ordered petitioners themselves to devise a remedy for the violation . . . .

430 U.S. at 832.

Defendants never devised any plan for a system or program, however. Instead, they appealed, arguing that a United States District Court may *never*, under any circumstances, devise a remedy for a *Bounds* violation that requires a state to develop a system for providing legal assistance in the form of lawyers.

The courts construing *Bounds* have not adopted Petitioners' rigid rule. They, like the courts below, have ordered the provision of lawyers as a remedy when inmates would not otherwise receive meaningful access. For example, the Fourth Circuit found, in a later proceeding in *Bounds* itself, that the district court appropriately ordered the remedy of a prison legal services program when, after ten years, "North Carolina was unable or unwilling to implement its library plan consistent with minimum constitutional requirements" and had thus failed to provide meaningful access to the courts. *Smith v. Bounds*, 813 F.2d 1299, 1304-05 (4th Cir. 1987), *opinion adopted en banc*, 841 F.2d 77 (4th Cir. 1988), *cert. denied*, 109 S.Ct 176 (1988). The Fourth Circuit noted that this "remedy flowed logically from *Bounds*." 813 F.2d at 1302.

Likewise, when the *only* way a Death Row inmate can obtain meaningful post-conviction review is through the assistance of a lawyer, requiring a state to provide counsel flows logically from *Bounds*. Indeed, after the Fourth Circuit's *en banc* decision below, the Third Circuit similarly concluded that, for Death Row inmates in post-conviction proceedings, meaningful access may call for the provision of counsel:

> [T]he Court in *Bounds* did not suggest that the right of access to the courts is always to be measured by a single invariant standard irrespective of the nature of the proceedings. It may well be that the scope of access to legal resources required under *Bounds* varies according

> to the proceeding. In proceedings directly implicating the validity of a death-sentenced prisoner's conviction, the availability of legal assistance from lawyers, rather than from other sources of legal knowledge, is more central to the vindication of prisoners' claims than in other civil claims filed by a death-sentenced prisoner, such as, for example, those complaining of conditions of confinement.

Peterkin v. Jeffes, 855 F.2d 1021, 1047 (3d Cir. 1988).

Nevertheless, Petitioners contend that in the post-conviction context, *Pennsylvania v. Finley*, 107 S.Ct. 1990 (1987), precludes the district court's remedy. In *Finley*, a noncapital case, this Court held that the procedural framework of *Anders v. California*, 386 U.S. 738 (1967), does not apply to Pennsylvania post-conviction lawyers seeking to withdraw from representation because there is no "constitutional *right to counsel*" for post-conviction proceedings. 107 S. Ct. at 1993 (emphasis added). But, in so stating, the Court pointed out that the provision of post-conviction counsel may arise from various legal sources besides a "right to counsel."

> Respondent apparently believes that a "right to counsel" can have only one meaning, no matter what the source of that right. But the fact that the defendant has been afforded assistance of counsel in some form does not end the inquiry for federal constitutional purposes. Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question.

107 S. Ct. at 1994. *Bounds* is just such another "source."

As the Fourth Circuit pointed out (847 F.2d at 1122), nothing in *Finley* suggests that this Court meant to limit in any way the relief that a district court could order to remedy a *Bounds* violation. There is no mention of *Bounds* in the *Finley* decision. And *Bounds* itself specifically rejected the argument that *Ross v. Moffitt*, 417 U.S. 600 (1974) -- the analytical underpinning for *Finley* -- in any way limited the scope of relief available to ensure meaningful access. 430 U.S. at 827. Had this Court intended *Finley* to have the far-ranging preclusiveness Petitioners now urge, the

Court would have had to address *Bounds*.[10] Supreme Court decisions spawning more than 500 published opinions in the federal reporters are not overruled, or substantially limited, *sub silentio*.

Moreover, neither *Finley* nor *Ross* involved or addressed the situation of a man on Death Row. The capital nature of this case is key. When there is a risk of a wrongful execution, a mechanical application of the analysis in *Finley* and *Ross* does not accord with fundamental fairness or with the principles underlying those decisions. The Fourth Circuit correctly concluded: "We do not . . . read *Finley* as suggesting that . . . counsel cannot be required under the unique circumstances of post-conviction proceedings involving a challenge to the death penalty." 847 F.2d at 1122.

As a result of these "unique circumstances," found by both the district court and the Fourth Circuit, a Death Row inmate pursuing post-conviction relief will not, in the absence of representation, have the "adequate opportunity to present his claims fairly" acknowledged by both *Ross* and *Finley*. *Ross*, 417 U.S. at 612, 616; *accord Finley*, 107 S.Ct. at 1993-94. Indeed, the inevitable execution that will result from the absence of a lawyer to obtain a stay will eliminate any possibility of review at all.[11]

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[10] The single mention of the phrase "the equal protection right of meaningful access", 107 S.Ct. at 1994, does not support such a substantial modification of the Bounds Fourteenth Amendment right to meaningful access to the courts. On numerous occasions, this Court has used the concept of "access" generically without any intention of referring to the right of access to the courts protected by *Bounds*. *See, e.g., Roberts v. Lavallee*, 389 U.S. 40, 42 (1967) (referring to "access to the instruments needed to vindicate legal rights"); *Burns v. Ohio*, 360 U.S. 252, 259 (1959) (filing fee "foreclose[s] indigents from access to . . . phase of the procedure").

[11] *Bounds* itself distinguished *Ross* on the grounds that courts engaged in discretionary review generally "are not concerned with the correctness of the judgment below." 430 U.S. at 827. For Death Row prisoners in Virginia, however, post-conviction review is directly concerned with whether the conviction and sentence is correct. Further, in both *Finley* and *Ross*, the petitioners sought to raise claims that had already been litigated and ruled upon previously. Because of that repetition of litigation, the petitioner's rights could be adequately protected by the existence of transcripts and prior briefs and opinions discussing the very questions to be reviewed a second time. The same is *not* true for capital post-conviction proceedings in Virginia. (*Supra* at 29)

Petitioners contend, however, that this Court should ignore entirely the capital nature of this case on grounds that, once a person's death sentence is affirmed on direct appeal, there is a radical transformation: The sanction of death is no longer different. (Br. at 18-20) This surrealistic view -- rejected by both the district court and the Fourth Circuit -- is entirely irrelevant to the actuality of an unrepresented man sitting in the death house at the Virginia State Penitentiary, a few steps away from the electric chair, unable to visit a law library, waiting to die. Moreover, this odd contention ignores the very reason why this Court has held that "death is different." "One of the principal reasons why death is different is because it is irreversible; an executed defendant cannot be brought back to life." *Woodson v. North Carolina*, 428 U.S. 280, 323 (1976) (Rehnquist, J., dissenting). *See also Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.") It is *finality* that makes the death sentence different -- regardless of the stage of the proceedings. If a mistake is discovered after the state has carried out the order of execution, that mistake can never be corrected. And somebody will have died in error.[12]

C. The District Court's Findings of Fact are Binding on Appeal

Judge Merhige's findings regarding (1) death row inmates' special circumstances, (2) the type of assistance necessary, and (3) the assistance actually available in Virginia are unquestionably findings of fact that, under Federal Rule of Civil Procedure 52(a), "shall not be set aside unless clearly erroneous." The Fourth Circuit, after reviewing the evidence, stated, "we cannot say these findings of fact are clearly erroneous." 847 F.2d at 1121.

This Court has repeatedly emphasized that the "clearly erroneous" standard is an extraordinarily deferential one. *Anderson*

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[12] Petitioners' extensive argument that "death is not different" as a matter of law is also merely a transparent attempt to circumvent the district court's factual findings that the fact of being on Virginia's Death Row results in unique constraints on an inmate's ability to exercise his right to pursue post-conviction proceedings without the assistance of a lawyer.

v. City of Bessemer City, 470 U.S. 564, 573-74 (1985). Where, as Defendants urge here, "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*[13] In addition, since the district court findings are to a great extent based on determinations regarding the credibility of witnesses -- including the nature of the actual assistance provided by institutional attorneys, the amount of assistance they could provide, and the abilities of Death Row inmates to proceed *pro se* -- "Rule 52(a) demands even greater deference . . . ." *Id.* at 575. And the usual practice of this Court is to "accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals" as was the case here. *N.C.A.A. v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984). *See also Graver Tank and Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.")

1. Death Row Inmates' Inability to Proceed *Pro Se* in Post-Conviction Proceedings

Not surprisingly, nowhere do Petitioners argue that Death Row inmates are capable of effectively representing themselves in state post-conviction proceedings -- the fundamental issue in this case. Nor do Petitioners ever dispute the district court's ul-

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[13] In a blatant attempt to sidestep Rule 52(a), Petitioners urge that the district court made no findings of fact, but rather relied on only "general policy considerations." (Br. at 25-26) Petitioners' labels cannot change the facts: Findings that capital cases are complex and involve severe time constraints, that Death Row inmates cannot conduct such litigation while preparing to die, that the institutional attorneys do not and cannot provide sufficient assistance, and that appointment of counsel is not guaranteed unless the court orders an evidentiary hearing are not mere "general policy considerations," but ultimate findings of fact based on the evidence. It does not matter whether the trial court states only factual conclusions -- that is still "no excuse for the Court of Appeals to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding." *Amadeo v. Zant*, 108 S.Ct. 1771, 1780 (1988).

timate finding that -- if the circumstances of capital litigation are as the court found -- counsel is necessary to ensure meaningful access to the courts for state post-conviction proceedings. Instead, Petitioners attack, attempting a divide-and-conquer strategy, the three specific factors that the court considered in reaching its conclusion. What is distinctive about capital cases, however, is not the existence of each of these factors, but the fact that the three factors converge: A Death Row inmate is required, in order to save his life, to litigate a complex case under tight time constraints while preparing to die. As this Court stated in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), plaintiffs must be given "the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."

In any event, Petitioners' *post hoc* rationalizations regarding the individual factors are superficial. They contend that no time constraints exist because "stays of execution *may* be granted to permit the inmate additional time to prepare and present his petition to the appropriate courts." (Br. at 29 n.9; emphasis added) This concession that stays are merely possible -- not guaranteed -- speaks for itself. In fact, obtaining a stay when there is not already an action pending is procedurally impossible. Even in the context of pending proceedings, stays are hardly granted as lightly as extensions of time. The inmates who have survived on Death Row for years have done so only because they had lawyers to do a massive amount of work in a very limited period of time in order to obtain a stay of execution. Unrepresented inmates such as Messrs. Boggs and Watkins have survived only because of the existence of this lawsuit. (J.A. 349-50, 366)

As for the difficulty of the legal work, Petitioners feebly state that "there is no evidence that the inmates on Virginia's death row are uniformly disabled from making any effort to research and develop claims using a law library." (Br. at 29) This assertion is simply beside the point. The ability of a Death Row inmate to research a civil rights claim -- such as whether a prison may open mail from a paralegal -- hardly ensures that the same inmate, with his life at stake, will be able to prepare a complete state habeas corpus petition (including *all* possible claims on pain of waiver) and

to prosecute that petition through the state system.[14] Likewise, it is irrelevant that there may be other criminal matters as complex as a capital case. An inmate convicted of violating the RICO Act will have the rest of his natural life to try to overturn his conviction. If a death-sentenced prisoner fails to research a host of claims adequately, investigate facts from Death Row, review the constantly changing case law, and master the procedural maze of capital and habeas law all in a period as short as 15-30 days, he will die. With him will expire potentially meritorious claims of innocence or violations of the Constitution.

Finally, Petitioners make light of the district court's finding "that an inmate preparing himself and his family for impending death is incapable of performing the mental functions necessary to adequately pursue his claims." 668 F. Supp. at 513. Defendants stand alone in their view. Justice Powell wrote in *Ford v. Wainwright*, 477 U.S. 399, 421 (1986), "It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death." In *Furman v. Georgia*, 408 U.S. 238, 288-89 (1972), Justice Brennan noted almost twenty years ago:

> [W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. . . . As the California Supreme Court pointed out, "the process

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[14] Petitioners' emphasis on mere research and development of claims misconstrues the scope of the *Bounds* right to meaningful access. Access also includes the ability to conduct a factual investigation and requires that an inmate not only get to the courthouse door, but also be able to prosecute his claims. *Bonner v. City of Prichard*, 661 F.2d 1206, 1212-13 (11th Cir. 1981) (en banc) (meaningful access reaches beyond the mere filing of a lawsuit); *Germany v. Vance*, 673 F. Supp. 1143, 1150 (D. Mass. 1987) (barring access to factual information violates *Bounds*). *See also Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process . . . ."); *McKeever v. Israel*, 689 F.2d 1315, 1320 (7th Cir. 1982) (appointment of counsel warranted in § 1983 case when indigent unable to conduct suitable factual investigation).

> of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." *People v. Anderson*, 6 Cal 3d 628, 649, 493 P2d 880, 894 (1972). Indeed, as Mr. Justice Frankfurter noted, "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." *Solesbee v. Balkcom*, 339 US 9, 14 (1950) (dissenting opinion).

See also Furman, 408 U.S. at 382 (1972) (Burger, C.J., dissenting) ("a man awaiting execution must inevitably experience extraordinary mental anguish"); Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. Law & Criminol. 860 (1983) (collecting studies). It is remarkable that Petitioners contend otherwise.

2. The Legal Assistance Available to Virginia's Death Row Inmates

Defendants bore the burden of demonstrating the adequacy of the assistance they provide. *Storseth v. Spellman*, 654 F.2d 1349, 1352 (9th Cir. 1981); *Rich v. Zitnay*, 644 F.2d 41, 43 (1st Cir. 1981). Defendants failed to meet that burden at trial; their present quarrel with the facts adds nothing more.

As for the assistance of the institutional attorneys, Petitioners merely contend -- without arguing that the court's findings were clearly erroneous -- that the district court adopted the wrong view of the evidence. Four institutional attorneys testified. The district court heard their testimony, asked its own questions, considered all the testimony carefully, decided which witnesses to credit, and drew conclusions from that testimony as to the assistance they actually provided and as to what additional assistance these lawyers were capable of providing. This careful weighing of testimony is precisely the situation described in *Anderson*, 470 U.S. at 578, when a finding "can virtually never be clear error."

With respect to court-appointed counsel, Petitioners complain that the district court did not give sufficient consideration to the possibility that counsel *might* be appointed. The issue, however, is not what is theoretically available for one inmate, but whether, by virtue of Va. Code § 14.1-183, *all* Death Row inmates

are in fact receiving adequate, effective, and meaningful access. This Court has already held in *Bounds* that the mere possibility that a judge might appoint counsel, such as Va. Code § 14.1-183 provides, is insufficient to ensure meaningful access to the courts: "[I]t is irrelevant that North Carolina authorizes the expenditure of funds for appointment of counsel in some state post-conviction proceedings for prisoners whose claims survive initial review by the courts." *Bounds*, 430 U.S. at 828 n.17.

Likewise, the Third Circuit has held that statutes -- identical to the statute at issue here -- that "hold out the possibility to a capital prisoner that a court to which he submits a habeas . . . petition may see fit to appoint lawyers" and do not mandate the appointment of counsel for preparation of the pleadings and subsequent litigation, "do not by themselves fulfill the Commonwealth's obligation under *Bounds* to ensure that prisoners on death row have access to the courts." *Peterkin v. Jeffes*, 855 F.2d 1021, 1045-46 (3d Cir. 1988); *Id.* at 1043 (statute that does not require assistance at pleading stage is insufficient). *See also Buise v. Hudkins*, 584 F.2d 223, 228 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979) (it is irrelevant that some inmates may have received assistance under a statute because *Bounds* requires more than the "mere availability" of assistance).

Finaly, Petitioners have not addressed the district court's finding that even if Virginia's proposed -- although to date hypothetical -- "system" of institutional and possible court-appointed attorneys were in place, it would not be adequate. 668 F. Supp. at 515. Instead, Defendants adopt a not-so-novel defense: They blame the victims of Defendants' own inaction. Defendants contend that any lack of access is the fault of the inmates for failing to use the "patchwork" system they assert is already in place. This argument ignores Plaintiffs Boggs and Watkins, who sat on Death Row for a year without receiving any help whatsoever despite numerous requests that this "system" assist them.

Earl Washington's predicament demonstrates the ephemeral nature of Petitioners' proposed "system". Mr. Washington or others acting on his behalf took every step Petitioners assert is necessary to receive assistance through their system. The result: Mr. Washington was nearly put to death.

Petitioners suggest that inmates move for the appointment of counsel prior to the filing of a habeas petition. When Mr. Washington's *trial and direct appeal* attorney made a motion for appointment of habeas corpus counsel at the hearing to set his execution date, the circuit court denied the motion. In defending this denial, Petitioners simply say "[n]o habeas corpus actions had been filed on Washington's behalf at that time." (Br. at 28) That is precisely the problem; what Mr. Washington needed was a lawyer to help him research, prepare, and file a petition. But, as Judge Merhige found, "appointments are made under this provision only after a petition is filed. . . ." 668 F. Supp. at 515.

Following this denial, Mr. Washington received no assistance from the institutional attorneys, although Mr. Giarratano contacted them on his behalf. (J.A. 204, 294) Petitioners suggest that the inmate merely indicate "to anyone that he want[s] to file a petition." (J.A. 284) Ms. Deans notified the Attorney General's Office repeatedly that Mr. Washington wanted to file a habeas action, but could not find an attorney. (J.A. 292-93) Petitioners also suggest that the inmate write a letter asking for counsel and "send it down to Judge Merhige, or anybody else." (J.A. 284, 274) Mr. Giarratano, acting on behalf of the mentally retarded Mr. Washington, did precisely that -- and sent a copy of the letter to the Attorney General's Office. (J.A. 11-13) Nevertheless, Virginia continued its inexorable march towards Mr. Washington's execution. Mr. Washington -- who jumped through every hoop of Virginia's "system" -- would have died but for the aid of a volunteer.

Petitioners' system ensures nothing. At best, some death-sentenced prisoner may, if he is fortunate, obtain legal assistance. This Russian-roulette proposal ignores the fundamental principle of *Bounds*. "[O]ur decisions have consistently required States to shoulder affirmative obligations to assure *all* prisoners meaningful access to the courts." 430 U.S. at 824 (emphasis added).

D. Representation is the Only Possible Way to Bring Order Out of the Chaos of Capital Post-Conviction Litigation

In their ardor to distract this Court from the district court's findings of fact and its common sense analysis, Petitioners invoke

the spectre of "an endless succession of collateral proceedings in which the petitioner invokes a right to counsel to challenge the effectiveness of the next previous attorney." (Br. at 16) Petitioners' hysteria is unjustified. The possibility of such infinite delay no longer exists. Virginia has already jousted with this spectre -- and won.

When Richard L. Whitley attempted to urge this point, the Fourth Circuit held: "The sole question presented in this appeal is whether, in view of the case of *Giarratano v. Murray*, 668 F. Supp. 511 (E.D.Va. 1986), the performance of Whitley's attorneys in his state habeas petition should be judged by the constitutional standard of ineffectiveness of counsel. . . . *Finley* forecloses Whitley's contention on appeal." *Whitley v. Muncy*, 823 F.2d 55, 56 (4th Cir. 1987). *See also Finley*, 107 S.Ct. at 1994 ("it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls 'whether one has the right to 'effective' assistance of counsel"); *Mitchell v. Wyrick*, 727 F.2d 773, 774 (8th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984) (no right to effective assistance of counsel in state post-conviction proceedings); *Howard v. Warden, Buckingham Correctional Center*, 232 Va. 16, 19, 348 S.E.2d 211, 213 (1986) (accord). The result of *Whitley* is self-evident, since a challenge to the effectiveness of habeas counsel in no sense attacks the legality of the conviction or sentence, a requisite of any habeas corpus action.

Mr. Whitley was executed four days after he invoked the *Giarratano* decision to challenge the effectiveness of his post-conviction attorney. The next inmate -- however unlikely -- to raise this issue in a habeas petition has little hope of deferring the finality of his sentence any longer than did Mr. Whitley.

While focusing on their unfounded apprehensions, Petitioners have failed to notice certain hard, cold facts that present the true dilemma. There are now 2,150 inmates in America under sentence of death, the highest total in our nation's history. More than half of these condemned inmates are still awaiting the outcome of their direct appeal; *they have not yet entered even the first stage of collateral review.* Wilson and Spangenburg, *supra*. In the near future, 1,216 death-sentenced prisoners will enter state post-conviction proceedings. *Id.* Al-

though almost all death penalty states will ensure counsel, Virginia will not (in the absence of an affirmance in this case).[15]

The result will be chaos. Although the Anti-Drug Abuse Act of 1988 provides for representation in federal habeas proceedings, the failure to provide representation at the state level will place an intolerable burden on the federal courts. Unrepresented inmates will be arriving at the federal courthouse door with a host of unexhausted claims, numerous procedural defaults, no findings of fact, and the inevitable need for an emergency stay -- all because of a lack of counsel. If, as Judge Merhige found, a *change* of counsel at the federal courthouse door would be "catastrophic", 668 F. Supp. at 517, consider a Death Row inmate arriving in federal court without ever having had an attorney review, research, and investigate claims never before raised.

The federal courts will be faced with making sense and order out of the madness. If the courts strictly apply the doctrines developed to preserve the integrity of state proceedings, capital inmates will be deprived of any meaningful collateral review and Congress's newly enacted right to counsel in federal court will be emasculated. If, however, the courts wish to ensure fairness, they will have to relax these well-established rules and essentially start from scratch in the review process. *See Jones v. Estelle*, 722 F.2d 159, 167 (5th Cir. 1983), *cert. denied*, 466 U.S. 976 (1984) ("Given this elemental role of counsel in our adversary system, we think it inevitable that the inquiry into excuse for omitting a claim from an earlier writ will differ depending upon whether petitioner was represented by counsel in the earlier writ prosecution.") It is thus deprivation of counsel -- not provision of counsel -- that will lead to a lack of finality and the federalization of state post-conviction proceedings.

The district court's remedy of providing for legal representation at an early stage is the only hope for eliminating the confusion that is now the hallmark of capital post-conviction litigation

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[15] Significantly, now that the issues in this case are clear, not a single state has joined Virginia in urging this Court to reverse the decisions below.

in Virginia. Defendants' own witness, Mr. Kulp, the Coordinator of all Capital Litigation in the Commonwealth, completely agreed:

> Well, basically we want to see the inmate have an attorney at State Habeas for reasons of economy and efficiency. When you have a death case, we recognize that it is going to be prolonged litigation and we want to see all matters that the inmate or the petitioner wants to raise be raised at one proceeding, and we can deal more efficiently with an attorney. And we prefer that from an economy standpoint we don't have to have more than one proceeding.

(J.A. 272)

II. THE JUDGMENT MAY BE AFFIRMED ON THE BASIS OF ALTERNATIVE GROUNDS

"[T]he prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). *See also Whitley v. Albers*, 475 U.S. 312, 326 (1986) ("Respondent correctly observes that any ground properly raised below may be urged as a basis for affirmance of the Court of Appeals' decision. . . .").

In the courts below, Plaintiffs consistently argued that the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Sixth Amendment, and the Suspension Clause of Article I all require a state to provide Death Row inmates with lawyers to represent them in state post-conviction proceedings. Although neither the district court nor the Fourth Circuit addressed these grounds (668 F. Supp. at 512; 847 F.2d at 120), each provides an independent basis for affirming the judgment below.

A. Counsel in State Post-Conviction Proceedings is Vital to Ensure that a Death Sentence is Not Imposed in an Arbitrary and Capricious Fashion

This Court has stated repeatedly that the Eighth Amendment requires a heightened degree of reliability in capital cases:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). This special degree of reliability is necessary in order to ensure that capital punishment is not imposed in an arbitrary and capricious manner, *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), and to ensure that no one who is innocent or has been unconstitutionally convicted is executed.

Post-conviction remedies, including state habeas corpus proceedings, have become a vital part of the mechanism that ensures the reliability of a capital trial and the proper imposition of the death penalty. As the success rates of capital post-conviction proceedings demonstrate (*supra* at 7-8), capital trials are usually unreliable. Thus, without habeas proceedings, society runs a substantial risk of killing an innocent man. Such a risk cannot survive Eighth Amendment scrutiny. *See Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("[A] risk [of an unwarranted conviction] cannot be tolerated in a case in which the defendant's life is at stake."); *Lockett v. Ohio,* 438 U.S. 586, 605 (1978) ("When the choice is between life and death, that risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

Indeed, this Court expects -- and relies on the fact -- that capital cases will receive a complete collateral review. Thus, in Plaintiff Johnny Watkins' own case, Justice Stevens, although acknowledging that there had been a clear constitutional violation, concurred in the denial of Watkins' petition for writ of certiorari on direct appeal in order to "allow the error to be corrected in collateral proceedings." *Watkins v. Virginia*, 475 U.S. 1099, 1100 (1986). Mr. Watkins was unable to begin such proceedings,

however, because he had no lawyer. *See also Sullivan v. Wainwright,* 464 U.S. 109, 112 (1983) (at the post-conviction stage in capital cases, "special care is exercised in judicial review"); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (in capital post-conviction proceedings, "the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error").

Likewise, in a concurring opinion in *Ford v. Wainwright*, 477 U.S. 399, 420 (1986), Justice Powell concluded that because modern practice includes "ordinarily both state and federal collateral review" and "[t]hroughout this process, the defendant has access to counsel," it is unlikely that an erroneous execution would occur. Unfortunately, contrary to Justice Powell's assumption, death-sentenced prisoners in Virginia do not have access to counsel. If the judgment of the Fourth Circuit were overturned, Justice Powell's "unlikely" scenario will in Virginia become the rule.

Moreover, it is clear that in this day and age, executing an unrepresented man goes beyond the bounds of decency. *See Trop v. Dulles,* 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). The reaction of states (other than Virginia) and the federal government to the growing crisis in capital post-conviction representation reveals that a national consensus has developed recognizing that post-conviction proceedings are a vital safeguard to ensuring the reliability of capital trials and that an integral part of this safeguard is the appointment of counsel to represent the death-sentenced inmate. As this Court said in *Gregg v. Georgia,* 428 U.S. 153, 174 n.19 (1976), "legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values."

The views of "respected professional organizations" also support the conclusion that leaving death-sentenced prisoners unrepresented offends the Eighth Amendment. *See Thompson v. Oklahoma*, 108 S.Ct. 2687, 2696 (1988) (noting the views of the American Bar Association and the American Law Institute on the minimum age for execution). The American Bar Association approved resolutions calling in 1979 for the appointment of counsel for capital post-conviction litigation in state and federal courts and in 1982 for appointment of counsel for prisoners generally. 104

American Bar Association Annual Report 245 (1979); 107 American Bar Association Annual Report 666 (1982). Local bar associations have echoed this view, as reflected in the Amicus Brief filed by the South Carolina Bar Association et al. *See also* IV ABA Standards for Criminal Justice, Standards 22-3.1(a), 22-4.3 (2d Ed. 1980); Uniform Post-Conviction Procedure Act § 5(a) (1980).

Virginia is thus part of a very small, and ever-shrinking, group of states that is unwilling to guarantee Death Row inmates counsel to assist them in post-conviction proceedings. The provision of counsel to Death Row inmates is, however, no longer just a "good idea"; it is a safeguard our society has come to regard as required by common decency. The Eighth Amendment requires affirmance.

B. Due Process Requires the Appointment of Counsel to Represent Death Row Inmates in State Post-Conviction Proceedings

In *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981), this Court considered the circumstances under which due process, or fundamental fairness, requires appointed counsel. Three elements are to be weighed: (1) the private interest at stake; (2) the governmental interest; and (3) the risk of an erroneous deprivation of liberty if counsel is not provided.

The private interest involved here is life and the avoidance of an erroneous loss of that life. As the Court wrote in *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985), in considering whether fundamental fairness required the appointment of expert witnesses in capital cases, "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."

To a very significant degree, the governmental interest overlaps that of the individual. "The State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed. . . ." *Ake*, 470 U.S. at 83-84. Petitioners themselves have acknowledged that their interest is identical to that of individual Death Row inmates: They prefer that the inmate have counsel in state post-conviction proceedings and that *new* counsel be appointed at that stage. (J.A. 272) *See also* 847 F.2d at 1122 and 668 F. Supp. at 515 (both noting the convergence of the individual's and society's interests).[16]

The risk that there will be erroneous decisions -- and thus erroneous executions -- is substantial in the absence of counsel. As the district court found, a failure to provide counsel in effect forecloses access to post-conviction review because a Death Row inmate is incapable of proceeding *pro se*. And, the Death Row inmate is then deprived of a better than even chance of receiving a new trial.

Finally, the Court noted that these interests must in turn be weighed against "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." 452 U.S. at 26-27. If the prisoner loses in habeas proceedings (which have become an integral part of the judicial review process in capital cases), he will suffer the ultimate loss of physical liberty -- death.

In this case, when (1) the proceedings involved will be the final determination whether the inmate lives or dies, (2) the individual interest is in an avoidance of an erroneous loss of life, (3) any adverse interest of the State is minor, and (4) the risk of error is intolerably high, due process requires the appointment of counsel. *Id.* at 31. As Chief Justice Burger wrote: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater

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16 The only adverse interests identified by Petitioners are finality and the desire that the inmate not select his own lawyer. (Br. at 16, 29) The latter concern is readily eliminated if the state provides counsel rather than forcing inmates to find volunteers. In any event, if a lawyer is willing to represent a Death Row inmate, is qualified, and otherwise unobjectionable, what legitimate reason can the Virginia Attorney General have for opposing his or her appointment? Finality is better served by the appointment of counsel. (*Supra* at pp. 43-45) Petitioners have not argued that providing counsel would impose too great a financial burden on the State. In any event, since numerous other states and the federal government make counsel available, any argument of financial burden would be unpersuasive. *Ake*, 470 U.S. at 78.

than any possible harm to the state." *Addington v. Texas*, 441 U.S. 418, 427 (1979).[17]

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the decision below be affirmed.

Respectfully submitted,

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[17] A failure to provide counsel for collateral review also violates the Sixth Amendment by interfering with an individual's ability in post-conviction proceedings to enforce his right to effective assistance of counsel at trial and on appeal. *See Kimmelman*, 477 U.S. at 378. Moreover, because of the exhaustion requirement and the deference given in federal court to state proceedings, a failure to provide counsel at the state level -- resulting in either a complete failure to pursue state relief or extensive procedural bars -- will effectively preclude an inmate from seeking relief through a federal petition for habeas corpus, thereby suspending the writ in violation of Article I of the Constitution. Finally, since an indigent condemned man cannot pursue post-conviction relief without the assistance of counsel and since a failure to pursue such relief will lead to an immediate execution cutting off the opportunity for such relief -- even though many of the inmate's claims may never have been heard by any court -- a failure to provide counsel to pursue remedies that other inmates may pursue denies equal protection.